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No. ~~674~~ 33

In the Supreme Court of the United States

OCTOBER TERM, 1959

ARTHUR M. McPHAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 272 F. 2d 627.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1959, and rehearing was denied on January 4, 1960. The petition for a writ of certiorari was filed on February 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant who, after having been subpoenaed to produce records by a Congressional committee, flatly and without explanation refuses to produce them, may raise certain defenses for the first time at his trial for criminal contempt.

STATUTE INVOLVED

2 U.S.C. 192 is set forth on page 2 of the petition.

STATEMENT

Petitioner was charged in a one-count indictment in the United States District Court for the Eastern District of Michigan with contempt of Congress in violation of 2 U.S.C. 192 (App. 3a).[1] The indictment alleged that petitioner had wilfully failed and refused to produce records of the Civil Rights Congress which he had been subpoenaed to produce before the House Committee on Un-American Activities or a duly authorized subcommittee thereof. After his motion to dismiss the indictment was denied (App. 4a), he was tried before a jury on December 18 and 19, 1956.

The evidence at the trial was as follows: The House Committee on Un-American Activities was constituted by the House of Representatives of the 82d Congress (App. 48a–50a). A duly authorized subcommittee of that Committee conducted a public hearing in Detroit, Michigan, on February 25 through 29, 1952. Petitioner was subpoenaed to appear to testify on February 26, 1952, and to produce "all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress" (App. 6a). Petitioner was subpoenaed because the Committee had information that he was executive director or executive secretary of the Civil Rights Congress, which had been declared a subver-

[1] "App." refers to the Appendix to petitioner's brief in the court below, which has been filed in this Court.

sive organization by the Attorney General and which was believed to be such an organization by the Committee (App. 20a–21a, 26a–27a).

At the outset of the subcommittee hearing, Congressman Wood, who was chairman of the subcommittee and of the Committee itself (App. 8a, 50a), stated that (App. 32a):

> Investigation in the city of Baltimore, the State of Massachusetts, and other places has disclosed a concentration of Communist effort in certain defense areas of the country. * * * There is no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit which won the title, "The Arsenal of Democracy." *The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof.* [Emphasis added.]

Petitioner, who was represented by counsel (App. 42a), appeare before the subcommittee on February 27. The following colloquy then occurred (App. 40a).

> Mr. WOOD. Mr. McPhaul, the committee has heretofore served upon you a subpoena duces tecum, to produce certain records and documents. Are you prepared to respond to that subpoena?
>
> * * * * *
>
> Mr. MCPHAUL. Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my priv-

ilege under the fifth amendment of the Constitution.

The petitioner was then sworn (App. 42a). After he had handed the subcommittee copies of a prepared statement and a petition (App. 42a–43a), he was asked (App. 45a):

> Mr. TAVENNER [counsel for both the subcommittee and Committee]. The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?
>
> Mr. MCPHAUL. My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.
>
> Mr. TAVENNER. My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?
>
> Mr. MCPHAUL. I have answered it in this statement.
>
> Mr. TAVENNER. No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> Mr. MCPHAUL. I will not.

The House of Representatives, approving the report of the Committee, cited petitioner for contempt (App. 51a).

The district court declined to charge the jury, as requested by petitioner, that the government must prove

the existence of the subpoenaed records and that they were in petitioner's custody or control (App. 100a-101a). Instead, the court charged (App. 90a–91a):

> If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.
>
> I also charge you that the defendant is not excused from compliance with or producing the record designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress.

The court subsequently instructed the jury that one of the questions it must determine was: "3. Did the defendant wilfully fail or wilfully refuse to produce the records designated in the subpoena before the said committee or subcommittee?" (App. 92a).

The jury returned a verdict of guilty and petitioner

was sentenced to nine months' imprisonment and to pay a fine of five hundred dollars (App. 97a–98a). On appeal, the court of appeals affirmed.

ARGUMENT

1. Petitioner contends that the decision of the court of appeals was erroneous because (1) the government failed to prove the existence of the records or their possession by petitioner, and the trial court refused to submit these issues to the jury (Pet. 8–19); (2) the subpoena was so broad and all-inclusive as to constitute an unreasonable search and seizure (Pet. (19–22); and (3) the evidence failed to prove that the subpoenaed records were pertinent to the Committee inquiry or that the petitioner was fairly apprised of such pertinency (Pet. 22–24). Since, however, petitioner failed to raise these objections before the Committee, he was not entitled to claim such defenses in his trial for contempt.

This Court has held in a series of cases that a witness cannot raise issues at his trial which were not made before the Congressional committee issuing the subpoena or asking the questions. In *Bevan* v. *Krieger,* 289 U.S. 459, when the witness issued a "sweeping statement that he would answer no further questions," this Court held that such an attitude "on its face constitutes a contempt." *Id.* at p. 465. Therefore, the Court refused to consider whether the witness had a privilege not to answer the questions or produce the documents. Similarly, in *United States* v. *Bryan,* 339 U.S. 323, 333, the Court, citing its earlier decision in *Bevan,* held that the government need not prove a quorum of the committee where

this objection was not raised at the time the witness refused to comply with the subpoena, since "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." The Court then went on to state: "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. * * * [I]f respondent had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ." *Id.* at pp. 331, 332; see *United States* v. *Fleischman*, 339 U.S. 349, 352. And only last Term, in *Barenblatt* v. *United States*, 360 U.S. 109, 123, the Court stated that a witness' contentions as to the pertinency of the questions asked must be raised initially before the committee.[2]

These principles, repeatedly restated by this Court, fully apply to all the issues raised by petitioner here. Petitioner, when asked to produce the records, responded flatly: "I will not" (see *supra*, p. 4). This unqualified refusal to comply with the subpoena, without explanation or excuse, in itself constituted a contempt, which may not be removed or mitigated by objections raised for the first time at petitioner's trial.

[2] In fact, the Court said that the objection must be raised in a manner which is clear and specific enough "to trigger what would have been the subcommittee's reciprocal obligation had it been faced with a pertinency objection." 360 U.S. at 124.

2. Petitioner's principal contention—that the government failed to prove, and the jury did not decide, the existence of the records or their possession by petitioner, that is, the ability of petitioner to comply with the subpoena—is fully answered by this Court's decision in *United States* v. *Bryan*, *supra*. There, the witness argued that "lack of a quorum is a defense raising material questions of fact which should have been submitted to the jury" and that she "could not have complied with the subpoena in the absence of a quorum had she wished to do so * * *." 339 U.S. at 330. But the Court rejected these contentions by stating that if "a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena." *Id.* at p. 332. And the Court then went on to consider a situation closely parallel to that involved here (*id.* at p. 333):

> Suppose one who has been summoned to produce papers fails to deliver them as required but refuses to give any reason. May he defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers? We think such a contention hardly tenable.

Similarly, it is "hardly tenable" for petitioner here to claim, long after he refused flatly to produce the documents, that they did not exist or, alternatively, that he did not have them. Even if, as petitioner so vigorously contends, the government has the initial burden of proof as to the issue of the existence and

control of documents (see *Traub* v. *United States*, 232 F. 2d 43, 47–48 (C.A.D.C.); *United States* v. *Patterson*, 219 F. 2d 659 (C.A. 2); cf. *United States* v. *Fleischman*, *supra*, 339 U.S. at 360–361), the defense must first be properly raised. The jury, having found pursuant to explicit instructions (*supra*, p. 5) that petitioner's refusal to produce was wilful, was not required to consider defenses[3] which were not raised at the proper time.[4]

Petitioner suggests (Pet. 14–15) that a requirement that he explain his non-production of the records might require him to incriminate himself.[5] He would not, however, incriminate himself simply by stating that he could not produce the records either because they did not exist or he did not have them, and he was not entitled to claim the privilege unless and until the questioning took a line which might incriminate him. Cf. *Rogers* v. *United States*, 340 U.S. 367,

[3] It is clear that the inability of a witness to comply with a subpoena is a defense. See *United States* v. *Bryan*, *supra*, 339 U.S. at 330; *United States* v. *Fleischman*, *supra*, 339 U.S. at 364.

[4] None of the cases cited by petitioner are in any way inconsistent with this view. Thus, in *United States* v. *Patterson*, *supra*, upon which he particularly relies (Pet. 8–10, 17), the witness had properly raised the issue of possession by stating, at the time of the demand, that he did not have the documents. *Id.* at p. 660.

[5] Petitioner, of course, cannot invoke the Fifth Amendment as to the *production* of the documents since an official or representative of an organization cannot invoke the privilege when ordered to produce the organization's books or records. *Rogers* v. *United States*, 340 U.S. 367; *United States* v. *White*, 322 U.S. 694; *Hale* v. *Henkel*, 201 U.S. 43, 72–75, 78.

372; *United States* v. *Coffey*, 198 F. 2d 438, 440 (C.A. 3. Thus, he could not refuse to make the simple statement that the documents did not exist or were not in his possession merely because a fuller explanation *might* incriminate him in some way which even now is not suggested.[6]

Moreover, petitioner could have raised this issue of the existence and possession of the documents without testifying at all. Petitioner's counsel, who was present at the subcommittee hearing, could have merely stated that the subcommittee must first show that petitioner had the documents within its control before they could demand their production or cite petitioner for contempt. Such a legal argument could not possibly have incriminated the witness. And had the issue been raised, petitioner need not have testified in support of his contention either before the subcommittee or at his trial since the government would have had the initial burden of offering evidence that the documents existed and were in petitioner's possession. See cases cited p. 9, *supra*.

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[6] *Traub* v. *United States*, *supra*, which petitioner cites (Pet. 16), indicates that, if a witness states that he does not possess the subpoenaed documents, he need not answer further questions as to what happened to them if such answers might tend to incriminate him. 232 F. 2d at 48. But *Traub* clearly did not consider the issue involved here—whether a witness must state that he is unable to comply with the subpoena at the time he fails to produce—since there the witness clearly stated that he did not have the documents. *Id.* at p. 45.

[7] Petitioner also suggests (Pet. 13–14) that, since only the House of Representatives itself could decide the questions of

3. Petitioner's contention that the subpoena constituted an illegal search and seizure is likewise barred by *United States* v. *Bryan*, *supra*. Even if we assume, *arguendo*, that the subpoena was too broad and comprehensive, petitioner could have easily raised the issue before the subcommittee. Just as in *Bryan* the committee's investigation was obstructed for several years because of the lack of a quorum which could readily have been rectified in a few minutes (see 339 U.S. at 333), so here the subcommittee could have provided a more detailed request for documents if an objection had been made. And just as in *Bryan* it would have been an "empty formality" to require the committee to summon a quorum to hear the witness "refuse to honor its demands" (*id.* at p. 334), so here the petitioner's flat refusal to produce demonstrated that his refusal would continue regardless of the form or language of the subpoena.

Moreover, the subpoena here did not violate the Fourth Amendment. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208–209, this Court held that "the Fourth [Amendment], if applicable, at the

existence and possession of the records, he was not required to raise the point before the subcommittee. But the subcommittee represented the House and had the powers of the House to compel production (see *Watkins* v. *United States*, 354 U.S. 178, 200–201), although, of course, the House had power to overrule the subcommittee's determination by refusing to cite petitioner for contempt. Moreover, if Congressional committees can pass on such issues as privileges (*Bevan* v. *Krieger*, *supra*), quorums (*Bryan* and *United States* v. *Fleischman*, *supra*), and pertinency (*Barenblatt* v. *United States*, *supra*), and if therefore these issues must be raised initially before them, there seems no reason to distinguish an issue concerning the existence or possession of the documents.

most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. * * * [R]elevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."[8] Petitioner does not contend that the subcommittee did not have authority to investigate Communism in the Detroit area (see *supra*, p. 2). And, as we show below (p. 13), the documents specified in the subpoena were directly pertinent to the subject of the investigation. Petitioner has made no showing that these requests made upon him were unreasonable in any way. Since in *Oklahoma Press Publishing Co.* this Court upheld subpoenas issued by an executive official which were as comprehensive as that involved here (cf. 327 U.S. at 210, note 46),[9] a subpoena issued by a Congressional committee, possessed of far broader investigative powers, must, *a fortiori*, also be valid.

4. The contentions raised by petitioner concerning

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[8] The Court also made clear in *Oklahoma Press Publishing Co.* that the Fourth Amendment's role in preventing improper use of subpoenas was much narrower than in prohibiting illegal searches and seizures. Unlike the abuses resulting from "actual search and seizures," the main objections to "officious intermeddling" is that it is expensive, time-consuming, and clogs "the processes of business." 327 U.S. at 213.

[9] Petitioner suggests (Pet. 23, note 7) that the subpoena here, in contrast to those in *Oklahoma Press Publishing Co.* was not limited in time. Since, however, the Civil Rights Congress was organized in April 1946 (see *Daily Worker*, April 24, 1946), the subpoena was in fact limited to a six-year period.

the pertinency of the subpoenaed records are also barred by *Bryan*. Moreover, in *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–125, this Court, in specifically considering this issue, made clear that objections considering pertinency must be raised initially before the Congressional committee.

In any event, the documents here were pertinent to the subcommittee's investigation, and petitioner was fairly apprised of their pertinency. At the opening of the hearing, the Committee chairman clearly stated that the purpose of the investigation was to determine whether there had been Communist activity in the vital defense area of Detroit, and, if so, the nature and extent of this activity (see *supra*, p. 3). The Committee had information that the Civil Rights Congress had been listed as a subversive organization and that the petitioner was an important official of that organization (see *supra*, pp. 2–3).[10] The records of the Civil Rights Congress relating to its organization, affiliation, receipts and expenditures were therefore pertinent to a determination whether it was Communist-dominated or infiltrated. And since the Civil Rights Congress was organized and operated in the Detroit area (see *Daily Worker*, April 24, 1946), the nature of Communist activity in the organization was directly pertinent to the subject of the investigation as expressed by the Committee chairman.

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[10] Moreover, two witnesses had earlier testified before the subcommittee that petitioner was a member of the Communist Party, App. 24a–25a; Hearings before the House Committee on Un-American Activities, 82d Cong., 2d Sess., Part I, pp. 2743, 2790; see *id.* at pp. 2840, 2842.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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MARCH 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960